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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-5872

BUDDY EARL JUSTUS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the Supreme Court of Virginia is reported at 222 Va. ___, 283 S.E.2d 905 (1981).

JURISDICTION

The petitioner claims that jurisdiction is founded upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I. Whether The Original Trial Judge's Presiding Over Petitioner's Re-Trial Over His Objection Violated His Rights Under The Fifth, Sixth And Fourteenth Amendments To The Constitution Of The United States?

II. Whether Petitioner Had A Constitutional Right Under The Sixth Amendment Or The Due Process Or Equal Protection Clauses Of The Fourteenth Amendment To State-Funded Independent Psychiatric Services?

STATEMENT OF THE CASE

According to a statement given by petitioner to police officers on October 13, 1978 (App. 182-94), on the morning of October 3, 1978, petitioner broke into several unoccupied homes in Montgomery County, Virginia, and stole money, jewelry, and guns. (App. 186, 190). Then in Ironto, petitioner entered an apparently unoccupied house trailer. (App. 187). As petitioner was taking money and a wallet on the table in the kitchen, he heard a noise from a bedroom and saw the decedent, Mrs. Ida Mae Moses, emerging. Petitioner admitted that he shot her three times with a .22 caliber pistol which had been stolen from one of the homes previously broken into. (App. 191). Petitioner further admitted that when he left she was already dead but denied that he had had sexual relations with her. (App. 193-94).

The decedent's husband, Frank W. Moses, stated that he and his wife had been expecting a child approximately ten days after the date of her death. (App. 540). As a result of her advanced pregnancy, the couple had last had sexual intercourse approximately a month and a half before the date of her death. (App. 545). Moses stated that when he returned home from work

about 2:00 p.m. on October 3, 1978, he found his wife dead and lying nude on the bed. Police officers who arrived shortly thereafter stated that the decedent's brassiere and blouse had been hooked around her right thumb and wrapped around her right wrist and further that her clothes and shoes were lying on the floor at her feet. (App. 519, 523).

The Commonwealth also introduced evidence which indicated that the first shot had been fired from an indeterminate range, that is, from a distance of more than eighteen to twenty-four inches, and had been to the back of the head. (App. 551-53). The second shot had been to the center of the forehead just above the root of the nose and had been "fired with the muzzle of the weapon nearly in contact with the skin." (App. 552). The third and final shot had been to the frontal area of the forehead above the left eyebrow. This shot, which passed through and destroyed the eyeball, had been fired "with the muzzle of the weapon less than six inches and probably closer to three inches to the target area." (App. 552). In the opinion of the physician who examined the decedent's body, the last two shots had been "in all probability fired in sequence." Any of the three shots would have been independently fatal. (App. 553).

The examination of the decedent also revealed that seminal fluid was present both in the pubic area and the vagina. (App. 550, 557). Additionally, a male fetus was in the uterus that was nineteen inches long and weighed approximately seven pounds. (App. 551). The examination of the seminal fluid samplings and the secretion typing test from samples of petitioner indicated that he could not be excluded as a source of

the seminal fluid. (App. 566-67).

The final witness for the Commonwealth was Dale Dean Goins. Goins testified that he first met petitioner on the day after the murder of Mrs. Moses when petitioner picked him up just north of Atlanta as he was hitchhiking. (App. 587-89). Goins stated that petitioner revealed to him that he had gone into a trailer near Roanoke, Virginia, and had "raped a woman and left her laying naked on the bed after he shot her and killed her." (App. 590). Petitioner also showed Goins some pennies that he had taken from the trailer. Prior to petitioner's admissions, Goins had heard nothing about the events in Virginia as he had been in Illinois up to that day. Goins admitted that he had been drinking during his conversations with petitioner but added: "I wasn't out of my mind so I didn't know what I was doing." (App. 595).

On October 8, 1980, the petitioner was convicted by a jury of capital murder during the commission, or subsequent to, the rape of Mrs. Moses in violation of § 18.2-31(e) of the Code of Virginia (1950), as amended. The penalty stage of petitioner's trial was conducted on the same date. At its conclusion, the jury returned with a verdict of the death penalty, finding that both of the statutory aggravating factors under § 19.2-264.2 were present. The trial court then ordered a post-sentence report to be prepared, and on November 6, 1980, the court affirmed the jury's recommendation, concluding that the sentence was appropriate. Petitioner then appealed his conviction to the Supreme

Court of Virginia, which accorded his case a priority status. On October 16, 1981, the Supreme Court of Virginia affirmed petitioner's conviction and held that the penalty imposed was neither excessive nor disproportionate.

ARGUMENT AGAINST GRANTING CERTIORARI

I. THE TRIAL JUDGE, IN EXCERCISING HIS DISCRETION TO PRESIDE OVER PETITIONER'S RE-TRIAL, VIOLATED NO RIGHT ACCORDED PETITIONER UNDER THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

As was argued on appeal to the Supreme Court of Virginia, petitioner contends that the trial court improperly presided over his second trial. This failure of the trial judge to recuse himself is alleged to have resulted in an unconstitutional abridgement of petitioner's rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. While petitioner makes no charge that the trial judge held any conscious bias against him, petitioner argues that he could not properly and impartially participate in the second trial. This supposedly stems from the fact that, pursuant to § 19.2-264.5 of the Code of Virginia, the judge at the end of the first trial reviewed the attendant circumstances of the case along with a pre-sentence report and upheld the jury's imposition of a sentence of death. Petitioner also refers to a fleeting remark made by the trial judge that the defense had made a motion for him to disqualify himself, "which I ought to grant." (App. 283).

Respondent would argue that the Supreme Court of Virginia acted properly in rejecting this contention. See Justus v. Commonwealth, supra, 283 S.E.2d at 908. The rule is clear in Virginia that a trial judge has discretion when considering a motion that he disqualify himself. See Taylor v. Taylor, 185 Va. 126, 37 S.E.2d 886 (1946); § 19.2-153. Petitioner attempts to avoid the application of this general rule by pointing to the fact that the trial judge at the end of the first trial exercised his statutory duty by imposing the death sentence against petitioner. Clearly, however, this is inadequate to justify the conclusion that the judge unconstitutionally failed to recuse himself at the outset of the second trial. The rule is well-established in Virginia that a trial judge need not disqualify himself from presiding in a criminal case simply "because in the disposition of a matter arising out of the same facts he has formed or expressed an opinion as to the guilt of the accused." See Slayton v. Commonwealth, 185 Va. 371, 376, 38 S.E.2d 45 (1946).

Respondent would argue that petitioner has disregarded the distinction between the kinds of actions or statements of a trial judge which require his disqualification and those actions or remarks which do not necessitate the appointment of a second judge. If a judge has in any way spoken or acted in a gratuitous manner, this manifests his extrajudicial, personal prejudice against the defendant and thus does not permit his presiding over

a second trial. If, however, he has simply exercised his judicial responsibilities and has merely weighed the evidence adduced against the defendant and disposed of the legal or factual questions arising in connection therewith, he has done nothing improper and is not precluded from further participation. See, e.g., Hirschkop v. Virginia State Bar Association, 406 F. Supp. 721 (E.D.Va. 1975).

Petitioner has pointed to nothing that would show such improprieties on the part of the trial judge. The Supreme Court of Virginia in its first decision involving petitioner, Justus v. Commonwealth, 220 Va. 971, 266 S.E.2d 87 (1980), in no way suggested that the trial court's error in not excluding for cause a certain venireman was the result of any personal animus against petitioner. As for the trial judge's statement that he "ought" to disqualify himself from the second trial, respondent would point out that in the very same sentence, the court stated: "I am sure that I can see that Mr. Justus receives a fair trial in Williamsburg, and I could see that he had one up here, if we were trying him here." (App. 283). The trial judge's actual attitude regarding his possible recusal was shown by the following statement made prior to trial: "I think I can give him a fair and impartial trial based on the law and evidence and what comes before the Court, and that's what the state pays me for is to try these cases and I'll be just as fair as I can and I will deny your motion, gentlemen." (App. 252-53).

Petitioner has pointed to nothing else whatever in the second trial which would in any way demonstrate any improper personal animosity on the part of the trial judge toward him. On the contrary, the trial judge granted petitioner's motions for a change of venue and for reasonable funds for a pre-trial investigation of prospective jurors and granted many of petitioner's proposed questions for voir dire. (App. 270, 289-326).

Petitioner cites no cases in support of his proposed constitutional rule requiring the trial judge's disqualification in petitioner's re-trial. In fact, the strong majority rule affords a trial judge discretion on the issue of his presiding over a criminal defendant's re-trial. For example, in Walker v. State, 408 S.W.2d 905 (Ark. 1966), appeal dismissed, 386 U.S. 682 (1967), the Supreme Court of Arkansas upheld the trial court's refusal to disqualify itself in the re-trial of a defendant whose first trial had ended in a sentence of death and who had had the conviction reversed on appeal. The appellate court stated that a review of the record of the second trial demonstrated that the trial judge had exhibited no personal bias or prejudice against the defendant. See also Withrow v. Larkin, 421 U.S. 35, 48-49, 56 (1975); Wyatt v. United States, 591 F.2d 260 (4th Cir. 1979); United States v. Mathias, 550 F.2d 180 (4th Cir. 1976), cert. denied, 429 U.S. 1107 (1977); Smith v. State of North Carolina, 528 F.2d 807 (4th Cir. 1975); Hanger v. United States, 398 F.2d (8th Cir. 1968), cert. denied, 393 U.S. 1119 (1969);

Webster v. United States, 330 F. Supp. 1080 (E.D.Va. 1971); State v. Vega, 40 N.C. App. 326, 253 S.E.2d 94, cert. denied, 444 U.S. 968 (1979); State ex rel Schmidt v. Justice, 237 So.2d 827 (Dist. Ct. App. Fla. 1970).

II. PETITIONER HAD NO CONSTITUTIONAL RIGHT TO A STATE-FUNDED PSYCHIATRIST SELECTED BY PETITIONER.

Petitioner raises a second contention in the present petition which was likewise rejected by the Supreme Court of Virginia. See Justus v. Commonwealth, supra, 283 S.E.2d at 908. Petitioner argues that in order for him to have prepared an effective defense, he was constitutionally entitled to a private psychiatrist of his choosing at state expense.

The record shows that petitioner was first examined by a doctor described as a physician skilled in the diagnosis of insanity. Thereafter, petitioner was sent to Southwestern State Hospital, and a report as to his condition was filed by a psychiatrist. Subsequently, petitioner was returned to Southwestern State Hospital for further mental evaluation and was examined by the same psychiatrist, another psychiatrist, and a clinical psychologist. The trial court in its discretion concluded that no additional testing was necessary. See Justus v. Commonwealth, 220 Va. at 978. Petitioner himself admits that his attorneys were at liberty to question these physicians and summon them to court. Petition for Writ of Certiorari at 9. While petitioner disavows any attempt on his part to undertake "expert shopping", he argues that this procedure was somehow inadequate to protect his constitutional rights under the Sixth

and Fourteenth Amendments. Respondent would note, however, that petitioner has not specifically explained how his examinations were in any way less than adequate. The most that he can say is that government-employed psychiatrists are inevitably influenced by their status.

Under these circumstances, respondent submits that petitioner's constitutional rights were fully adhered to. It is clear in Virginia that a criminal defendant does not have an absolute right to a private psychiatric examination at the expense of the Commonwealth. See, e.g., Mason v. Commonwealth, 219 Va. 1091, 254 S.E.2d 116 (1979). This Court has also held that a state does not have an unqualified constitutional duty to provide a psychiatrist to a defendant for a pre-trial examination. See United States ex rel Smith v. Baldi, 344 U.S. 561, 568 (1952). A number of federal and state courts have also rejected arguments of defendants comparable to that of petitioner that they had a constitutional right to a private psychiatrist of their choosing. See, e.g., Payne v. Thompson, 622 F.2d 254 (6th Cir.), cert. denied, 449 U.S. 1063 (1980); Satterfield v. Zahradnick, 572 F.2d 443 (4th Cir.), cert. denied, sub nom, Satterfield v. Mitchell, 436 U.S. 920 (1978); United States ex rel Dessus v. Pennsylvania, 452 F.2d 557 (3d Cir. 1971), cert. denied, 409 U.S. 853 (1972); Matlock v. State, 566 S.W.2d 892 (Ct.Crim.App.Tenn. 1978); State v. Rhodes, 191 Neb. 131, 214 N.W.2d 259 (1974); Massey v. District Court in and for Tenth Judicial District, 506 P.2d 128 (Colo. 1973).

All of these cases recognize that psychiatrists are physicians, not advocates, and neither sound administration, basic fairness, nor constitutional standards require the furnishing of a psychiatrist sufficiently sympathetic to a defendant so that he can assist defense counsel in preparing his case favorably to his claims. See Proctor v. Harris, 413 F.2d 383 (D.C. Cir. 1969). Consistent with the above principles, respondent argues that in the instant case petitioner's mental state was thoroughly and adequately examined prior to trial, that petitioner had an adequate opportunity to place any issues pertaining to his mental condition before the trial judge and that he was denied no constitutional right when the trial court refused to appoint a private psychiatrist.

CONCLUSION

For the reasons presented, the respondent respectfully contends that the issues raised in this case are neither important nor substantial and asks that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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